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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-629

THE NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Appellant.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS

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The appellee moves the Court to dismiss the appeal because it does not present a substantial federal question and does not present any issue meriting plenary review by this Court.

ARGUMENT

State tribunals, responsive as they must be to local electorates, are never predisposed to sacrifice local revenues to tax immunities, whether these immunities are provided by state statutes or dictated by the United States Constitution. As a consequence, only the strongest cases involving claims of tax immunity survive the state appellate process and the instant case is one of

them. Here the Supreme Court of Ohio was completely convinced by the Record made that the UNIQUE machines of National Cash Register Company are irrevocably and irretrievably committed to the export process and thus are constitutionally immune from Ohio's ad valorem personal property tax under Article I, Section 10, Clause 2, of the United States Constitution.

The decision rendered by the Ohio Court was based on the uncontroverted facts regarding the machine themselves, all of which proved the certainty of their export. Although appellant's Jurisdictional Statement completely neglects mention of these facts, the Supreme Court of Ohio found them sufficiently important to merit four pages of its opinion. When these facts are examined it will be seen that the machines in question are highly sophisticated electronic data processing systems, accounting machines and cash registers. All have been custom manufactured pursuant to special foreign orders and tailored to fit the individual needs of foreign customers in many foreign lands. All have been segregated from domestic goods and moved from production areas to a warehouse. All have then been specially packaged for export shipment. Without any exception whatever, all warehoused machines are later sent to their foreign destinations and none has ever found its way back into the United States. **DUE TO THEIR UNIQUE PHYSICAL CONSTRUCTION AND SPECIAL ADAPTATION FOR FOREIGN USE, THE MACHINES INVOLVED ARE USELESS IN THE DOMESTIC MARKET.**[1]

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[1] The decision of the Ohio Court points out that the machines were "not merely noncompetitive in the United States, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detents and motors; and specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, in terms of standard voltage and cycles and, in some instances, as between AC and DC current."

At the time the NCR machines were taxed by Ohio they were in the warehouse committed to shipment abroad. This warehousing was required for reasons predominantly beyond control of National Cash Register. As pointed out by the Ohio Court, many foreign countries will not allow a partial shipment and therefore as the machines are manufactured they must be consolidated prior to shipment. In many instances NCR is unable to obtain an import license from the country to which the machines are to be shipped at the time the shipment is ready, even though the country of destination may have agreed to supply one at the time the order was placed. Import licenses are usually tied to the foreign exchange situation in the particular foreign country, which is often impossible to predict. Related difficulties involve local fluctuations in currency values and availability of foreign currency.

In rendering its decision, the Supreme Court of Ohio carefully weighed all these facts, and others, and because of them concluded that the NCR machines were commited to the export process beyond any doubt. The Court expressed its conviction in these words:

> "Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case . . . ."

The appellant Tax Commissioner of Ohio asserts a substantial federal question is presented by this case. The sole contention made is that constitutional immunity from state taxation should be afforded export goods only if, and only when, such goods have been loaded aboard a carrier and commenced their physical journey abroad. Appellant insists, essentially, that a state court must close its eyes to all other facts that may equally prove irrevocable commitment to the export process. Admittedly, delivery to a carrier has been one evidentiary

test applied by the Supreme Court of the United States in several prior cases to answer the question of when goods become exports shielded from taxation by the Constitution. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica v. County of Merced*, 337 U.S. 154 (1949). Each of these cases, however, involved property which was by its very nature fungible and from a physical standpoint, completely capable of being diverted to and used within the domestic market (baseballs and bats; oil; gasoline; cement plant and related equipment). Therefore, in those instances, nothing less than physical delivery of the goods to a carrier could unequivocably evidence commitment to the export process and provide positive assurance the goods would never be diverted to domestic use.[2] The Ohio Supreme Court did not subvert these holdings, but instead expressed its complete accord with them. It simply found that the degree of certainty of export for the unique NCR machines was:

> ". . . fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

The language of the Ohio Court's opinion echoes the words of Justice Douglas in *Richfield Oil Corp. v. State Board of Equalization* to the effect that delivery to a

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[2] The concern with diversion to domestic use is well emphasized in the cases cited. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 70 (1923): "[T]hey might change their mind and retain the balls and bats for their own use." *Richfield Oil Corp., v. State Board of Equalization*, 329 U.S. 69, 83 (1946): [T]here was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use." *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286, 288 (1949): "While in storage, the gasoline might have been diverted to domestic markets . . . ." *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 157 (1949): "It (the goods in question) might still have been diverted into the domestic market."

common carrier is not the *sine qua non* of export immunity if other facts also conclusively prove commitment to the export process:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration . . . ."
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> 329 U.S. 69, 82 (1946).

The "certainty" of which Mr. Justice Douglas spoke in *Richfield* is the certainty that the export process has been irrevocably initiated and will not be aborted. This is the true standard of constitutional immunity and all evidentiary tests have value only in measuring the degree of certainty. In the case at bar, the Ohio Supreme Court carefully weighed all the evidentiary facts presented and found the certainty of export for the NCR machines established beyond any doubt.

Finally, it is easy to understand why the appellant's Jurisdictional Statement fails to demonstrate a significant federal question intertwined in this case. It is simply because export immunity from state taxation has never been, is not now, and is not likely to become a troublesome area for either taxing authorities, taxpayers or state courts. Indeed, the very paucity of reported cases throughout the United States involving claims of export immunity amply evidences the unimportance of the federal question. Moreover, when this Court denied certiorari in *Montrose Chemical Corp. v. County of Los Angeles,* 243 Cal. App. 2d 300, cert. den. 386 U.S. 1004, and in *Rice Growers Ass'n. of California v. County of Yolo,* 17 Cal. App. 3rd 227, cert. den. 404 U.S. 941, it indicated that no substantial federal question is pre-

sented by state court decisions reflecting thoughtful and deliberate factual determinations that goods are, or are not, because of the certainty or uncertainty of their exportation, exports subject to the immunity afforded by the Constitution of the United States. Essentially, this is an area of law in which the peculiar facts of each case must dictate the ultimate legal conclusion and no universal evidentiary test can be prescribed. Therefore, appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,
ROGER F. DAY
Attorney for Appellee

DARGUSCH & DAY
Columbus, Ohio
Of Counsel

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Roger F. Day, being first duly sworn, deposes and says he is Counsel for National Cash Register Company, appellee herein; that he did on the 23rd day of November, 1973, serve three copies of the foregoing Motion to Dismiss upon William J. Brown, Attorney General of Ohio, Counsel for appellant herein, by delivery of the same to him at his office in Columbus, Ohio, in conformity with Rule 33(3) (C) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

/s/ ROGER F. DAY

Sworn to before me and subscribed in my presence at Columbus, Ohio, this 23rd day of November, 1973.

/s/ Ted B. Clevenger
Attorney at Law
Notary Public, State of Ohio